IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. --- OF 2006
IN
CRIMINAL WRIT PETITION NO.1883 OF 2006

Shamsundar Narsinh Dube ...Petitioner
Vs.
The State of Maharashtra & Ors. ...Respondents
And
Sanjay Chaitya Kadu ...Intervener

Mr. S.R. Chitnis i/b. Mr. M.S. Mohite for Applicant
Mr. S.R. Borulkar, P.P with Mr. A.S. Gadkari, A.P.P for the State
Mr. P.K. Dhakephalkar i/b. Mr. Ramesh A. Karale for Respondent

CORAM: SHRI J.N.PATEL &
SMT. ROSHAN DALVI, JJ.
DATED: 13TH SEPTEMBER, 2006

P.C.

1. Heard.

2. This is an application for intervention on behalf of the original accused no.1 after we disposed of Criminal Writ Petition No. 1883 of 2006 objecting to removal of Mr. Shivraj Patil as a Special Public Prosecutor and in his place

appointment of Mr. Mishra.

3. It is the case of the Intervener that this Court ought to have heard Mr. Patil in the matter before passing the order. Mr. Chitnis the learned Senior Counsel fairly concedes that the accused has no right to be heard in the matter of appointment of Public Prosecutor or Special Public Prosecutor, but this intervention is made in order to appraise the Court of the correct legal position as per the view taken by this Court in a decision rendered in the case of Sushil Hiralal Chokhani Vs. State of Maharashtra & Anr., 2005 ALL MR (Cri.) 2673, head note no.4 of the reported judgment.

4. We are of the opinion that the Intervener has no locus in the matter and need not be heard. This Court has after examining the facts and circumstances of the case specifically directed the Respondent State to appoint Mr. Mishra as Special Public Prosecutor who was earlier incharge of the case which in no way cause any prejudice to the accused persons. The learned A.P.P has placed before us notification dated 12th September, 2006 issued pursuant to the orders passed by this Court appointing Mr. Satish Mishra, Advocate, Pune as Special Public Prosecutor for

conducting the T.S.C. No.2/96, 1/97 and 2/97 in the TADA Court, Pune. Clause No.4 of the Notification it has been specifically stated the Government reserves the right to revoke/modify/annul the order without assigning any reason, which according to the learned P. P is a matter of routine while appointing Special Public Prosecutor. We make it clear that such a clause cause a shadow on the independence of the Special Public Prosecutor and if at all the Government is not satisfied with the performance of the Special Public Prosecutor it should spell out the same by giving reasons while revoking/modifying and annulling the order.

5. Mr. Chitnis, the learned Senior Advocate pointed out to us that the Review committee appointed by the State Government has recommended to the State Government to withdraw the prosecution of the accused persons in TADA (P) Act 1987 and Mr. Chitnis submitted that it is apprehension on the part of the accused persons facing trial that Mr. Satish Mishra who has been appointed as Special Public Prosecutor would not abide by the instructions which may be given by the State Government it it accepts the recommendations of the Review Committee to make an application before Court to withdraw under Section 321 of

Cr.P.C. This in our view is totally misconceived as we may make it clear that Section 321 spells out that the Prosecutor should take independent decision in the matter and it is the sole discretion and responsibility of the Prosecutor to make such an application. The matter does not rest here even if such an application is made, it is for the Court who would ultimately decide whether to allow such an application or reject it. This Court in the case of Vijay Valia Vs. State of Maharashtra 1987 MhLJ, 49 had an occasion to consider the issue that the Special Public Prosecutor appointed at the instance of the complainant and paid for by him is bound to act to the prejudice of the accused and in para 9 of the reported judgment negatived all such contentions it has based on erroneous conceptions – it reads as under :-

> *"9. According to us this argument is based on certain erroneous conceptions. We have pointed out earlier that criminal prosecutions are launched not only by the State but also by private parties. The role of the Prosecutor in any criminal trial whether at the instance of the State or a private party is to safeguard the interests of both the complainant and the accused. The right to be heard includes the right to be represented by an able spokesman of one's confidence. This right belongs both to the accused and the complainant. It is not only the accused who is in need of assistance and protection of his rights but also the complainant. In fact, it is to vindicate the rights and grievances of the complainant and through him, of the State, that the prosecution is*

launched – whether by the State or the private party. The purpose of a criminal prosecution is to bring home the guilt of the accused and to punish him. The Prosecutor has therefore to discharge his duties diligently towards this end. A Prosecutor who fails in and neglects his duties is doing no service to the administration of justice. In the discharge of his duties as a Prosecutor he is ordained by law, by professional ethics and by his role as an officer of the Court, to employ only such means as are fair and legitimate, and to desist from resorting to unjust and wrongful means. This is so whether the prosecution is private or State. The duties of the Prosecutor and the requirements of a fair trial do not vary from case to case. Besides, there is always the Court to safeguard the interests of the accused and the complainant, to control the proceedings and to check omissions and commissions of the Prosecutor. The Court is not a silent spectator to the proceedings, but an active participant in it. It has to hold the scales even between the complainant and the accused. In the State prosecution, all relevant material including the statements of all persons recorded during the course of investigation, is furnished to the accused and the Court. If all the required witnesses are not examined or the relevant material is not brought on record, both the accused and the Court have a right to call for them. This role of the Court does not vary from prosecution to prosecution. To accept the argument advanced on behalf of the petitioners therefore is to hold that the trials in private prosecutions and those in State-prosecutions vary in character and while the latter are fair, just and impartial, the former are not. Such a proposition is not only inequitable but also perilous. For it must logically lead to banning of all private prosecutions. It is for these reasons that we are unable to accept the theory that where Special Public Prosecutors are

appointed whether paid by the State or the private party, the prosecution and the trial must be presumed to be biased, partial or unfair."

6. What we understand from the submission made by Mr. Chitnis on behalf of the accused is that the accused persons want the State Government to appoint a Prosecutor of their choice. Therefore, the application for the intervention is rejected on two counts, firstly being infructuous as it is filed after the Petition came to be disposed of and secondly as no merits.

(SMT.ROSHAN DALVI, J.) (SHRI. J.N. PATEL, J.)